

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PETER JACKSON,)
vs.)
AMERICAN FAMILY MUTUAL INSURANCE)
COMPANY,)
Plaintiff,)
Defendant.)
)
Case No. 2:10-cv-01874-LRH-PAL
ORDER
(Mot Strike Witnesses - Dkt. #34)

Before the court is Defendant's Motion to Strike the Testimony of Plaintiff's Untimely Disclosed Witnesses Pursuant to FRCP 37(c)(1) (Dkt. #34). The court has considered the Motion, Plaintiff's Opposition (Dkt. #36), and Defendant's Reply (Dkt. #37).

BACKGROUND

The Complaint (Dkt. #1) was filed October 25, 2010. The Complaint asserts claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and violation of Nevada’s Unfair Claims Practices Act against his UM/UIM insurance company, Defendant American Family Mutual Insurance Company (“American Family”). His claims arise out of the May 20, 2004, automobile accident in Clark County, Nevada. Plaintiff alleges that he was struck by a third-party driver and sustained serious injuries. The third-party driver was uninsured. Plaintiff made a policy limits demand on American Family for his uninsured/under insured motorist insurance benefits. Defendants refused to pay policy limits, but allegedly offered an inadequate amount in an attempt to force the Plaintiff to accept less money.

The Defendant filed an Answer (Dkt. #6) January 18, 2011, and the parties submitted a proposed Discovery Plan and Scheduling Order (Dkt. #11) March 4, 2011, which the court did not approve. The court's Scheduling Order (Dkt. #12) established an August 31, 2011, discovery cutoff

1 and other deadlines generally consistent with the requirements of LR 26-1(e). At a hearing conducted
2 July 19, 2011, on Defendant's Motion to Enforce Insurance Contract (Dkt. #14), the parties requested
3 an adjustment of the discovery plan and scheduling order deadlines. The court granted a 90-day
4 extension of the discovery plan and scheduling order deadlines, measured from July 1, 2011. The
5 discovery cutoff was extended to November 29, 2011, with a September 29, 2011, deadline to disclose
6 experts, and an October 31, 2011, deadline to disclose rebuttal experts. See Order Dkt. #20.

7 On December 12, 2011, Plaintiff filed an Emergency Motion to Complete Discovery (Dkt. #27).
8 The court held a hearing on the motion on January 6, 2012, and denied it. The court also denied
9 Defendant's Counter Motion for Protective Order (Dkt. #28) as moot. In the current motion, Defendant
10 seeks to strike three witnesses disclosed by Plaintiff for the first time on the last day of the extended
11 discovery cutoff, November 29, 2011. Counsel for Defendant advised the court at the January 6, 2012,
12 hearing that these three witnesses, Byron Tulliver, Ron McCormick, and Lamont Cue had been
13 disclosed on the last day of the discovery cutoff. The court declined to enter any order as no motion
14 had been filed.

15 Following the hearing, counsel for Defendant met and conferred with Plaintiff's counsel in an
16 attempt to resolve this discovery dispute without the court's intervention. Counsel for Defendant
17 proposed striking the witnesses as untimely disclosed. Counsel for Plaintiff contended the disclosure
18 was timely, but offered to reopen the discovery deadlines to allow these witnesses to be deposed. The
19 parties reached an impasse and this motion was filed.

20 Defendant argues these witnesses should be excluded from testifying and stricken pursuant to
21 Rule 37(c)(1) because they were not timely disclosed and Plaintiff's failure to timely disclose these
22 witnesses is neither substantially justified nor harmless. Counsel for Defendant asserts that Plaintiff's
23 counsel knew of the existence of these witnesses throughout the case and failed to disclose them until
24 the last day of the extended discovery cutoff. Plaintiff served the supplemental Rule 26(a) disclosure
25 identifying these three witnesses on November 29, 2011. Plaintiff provided a one sentence description
26 accompanying the supplemental disclosure that each witness was "expected to testify as to his
27 knowledge of the injuries that Mr. Jackson sustained as a result of the incident that occurred on May 20,
28 2004, and any other matters pertinent hereto."

1 Defendant points out that the court denied the Plaintiff's motion to conduct additional
2 discovery, after twice extending the discovery plan and scheduling order deadlines indicating that no
3 further discovery would be allowed. Plaintiff's offer to reopen discovery to allow these three witnesses
4 to be deposed "is tethered to his desire to depose Defendant's adjusters", which the court denied.
5 Under these circumstances, the court should strike these late-designated witnesses, and preclude them
6 from testifying. Additionally, defense counsel seeks an award of attorney's fees in the amount of
7 \$1,280.00 for 8 hours of attorney time at the rate of \$160/hr. to prepare the motion, review an
8 opposition, draft a reply, and appear for a hearing.

9 Plaintiff opposes the motion asserting the witnesses were timely disclosed on the last day of the
10 discovery cutoff. Plaintiff represents "these witnesses were only recently discovery [sic] by Plaintiff
11 after a diligent search for the current location of these witnesses who knew him prior to the accident
12 that occurred almost eight years go." Defendant will suffer no prejudice, because Plaintiff's counsel
13 has offered defense counsel an opportunity to reopen discovery on a limited basis to depose these
14 witnesses. Additionally, Defendant filed a summary judgment motion which is pending and no hearing
15 date on the motion has been set. Thus, "there is still plenty of time to conduct these depositions."
16 Finally, Plaintiff asserts Defendant is merely attempting to insert procedural arguments to avoid having
17 this case heard on the merits, and did not raise the timing of the disclosure until well over a month after
18 the witnesses were disclosed. Finally, if the court disagrees, counsel for Plaintiff argues there is no
19 basis to award attorney's fees because Plaintiff's counsel has attempted to work with opposing counsel
20 to schedule depositions and reopen discovery, and there has been no bad faith or dilatory conduct on the
21 part of Plaintiff or his counsel.

22 Defendant replies that Plaintiff's opposition contains no citation to legal authority. Defense
23 counsel also argues Plaintiff should have disclosed the identity of these witnesses and then later
24 supplemented disclosures when their contact information was learned. The contact information that
25 Plaintiff did provide with the supplemental disclosure served November 29, 2011, consisted of two
26 telephone numbers for these witnesses. Defense counsel asserts it is unlikely Plaintiff's counsel
27 discovered the witnesses' phone numbers on the last day of the discovery cutoff, and that it is more
28 likely Plaintiff's counsel has been "sitting on this information for some time" and only disclosed these

witnesses “as an afterthought.” Counsel for Defendant also points out that Plaintiff’s counsel did not submit an affidavit or any facts to support his statement that counsel conducted a diligent search for these witnesses, or detail what difficulties he had locating them. As defense counsel understands the Plaintiff’s opposition, these three witnesses are all friends of the Plaintiff and local witnesses. As Plaintiff knew them both before and after the accident, there is no justification for their late disclosure. Finally, defense counsel disputes that he waited until a month after their disclosure to object. Defendant’s Opposition to Plaintiff’s Emergency Motion to Complete Discovery (Dkt. #28) was filed December 13, 2008, and objected to Plaintiff’s November 29, 2011, first supplemental witness list which disclosed these three new witnesses.

DISCUSSION

Because of heavy caseloads, trial courts enter scheduling orders “to establish deadlines to foster the efficient treatment and resolution of cases.” *Wong v. Regents of the University of California*, 410 F.3d 1052, 1060 (9th Cir. 2005). A trial court’s case management efforts “will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines.” *Id.* at 1061. Failure to comply with the scheduling order deadlines “may properly support severe sanctions and the exclusion of evidence.” *Id.* The Ninth Circuit has recognized that disruption of the court’s discovery plan and scheduling order “is not harmless.” *Id.* at 1062.

Federal Rule of Civil Procedure 37 authorizes sanctions for a party’s failure to make disclosures or cooperate in discovery. Rule 37(c)(1) provides, in relevant part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

Federal Rule of Civil Procedure 37(c)(1).

Having reviewed and considered the moving and responsive papers, as well as the procedural history of this case, the court finds Plaintiff’s disclosure of these three witnesses is not timely. Plaintiff’s opposition to the motion indicates that these three witnesses, who were disclosed on the last day of the extended discovery cutoff, are friends of the Plaintiff who knew him before the March 20, 2004, accident. They were disclosed too late for Defendant to conduct formal or informal discovery.

1 The one-line description of their expected testimony is deficient. The only contact information
2 provided in the untimely disclosure are the witnesses' two telephone numbers. The court finds their
3 untimely disclosure was not substantially justified. Additionally, the court finds that their untimely
4 disclosure was not harmless. The burden is on the party facing discovery sanctions under Rule 37(c)(1)
5 to prove harmlessness. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Plaintiff
6 has not met his burden.

7 In this case, the court rejected the parties' initial request for more than twice the amount of time
8 deemed presumptively reasonable by LR 26-1(e) in which to conduct discovery, but gave the parties
9 180 days, measured from the date the parties conducted their Rule 26(f) conference, rather than from
10 the date of the Defendant's answer, in which to complete discovery. The court also granted the parties'
11 request for an adjustment of the discovery plan and scheduling order deadlines, and gave the parties an
12 almost 120-day extension of the discovery plan and scheduling order deadlines. The court indicated at
13 the hearing conducted July 19, 2011, and in written Order (Dkt. #20) that no further extensions would
14 be allowed. Under these circumstances, Plaintiff's offer to reopen discovery to allow defense counsel
15 an opportunity to depose these three witnesses does not render the late disclosure harmless. The parties
16 do not have the authority amend the court's discovery plan and scheduling order deadlines, or to reopen
17 discovery. Even if defense counsel had stipulated to reopening discovery to depose these three
18 witnesses, the stipulation would not be binding on this court. LR 7-1(b) is explicit: "[a]ny stipulation
19 that would interfere with any time set for completion of discovery, for hearing of a motion, or for trial,
20 may be made only with the approval of the Court." The Plaintiff disclosed these three witnesses too
21 late and without substantial justification. The failure to comply with the court's case management
22 deadlines is not harmless.

23 For the reasons stated,

24 **IT IS ORDERED** that:

- 25 1. Defendant's Motion to Strike the Testimony of Plaintiff's Untimely Disclosed Witnesses
26 Pursuant to FRCP 37(c)(1) is **GRANTED**, and Byron Tulliver, Ron McCormick, and
27 Lamont Cue shall be precluded from testifying in Plaintiff's case in chief.

28 / / /

2. Defendant's request for monetary sanctions is **DENIED**.

Dated this 8th day of March, 2012.

Peggy A. Teen
Peggy A. Teen
United States Magistrate Judge